This matter comes before the Commission on appeal from a contract\(^3\) Administrative Judge’s (AJ’s) September 10, 2018, decision and order, which (1) entered a finding of discrimination that Complainant was retaliated against when the Agency issued him a Letter of Reprimand (Letter of Reprimand); and (2) found no discrimination based on Complainant’s race, or in reprisal for protected equal employment opportunity (EEO) activity, when an investigation into an allegation made by Complainant was not as quickly processed as other investigations. In its November 14, 2018, final order, the Agency affirmed the AJ’s finding of no discrimination and rejected the finding of discrimination; the Agency simultaneously filed the instant appeal requesting that the Commission affirm its rejection of the AJ’s finding of discrimination. The Commission accepts the Agency’s appeal pursuant to 29 C.F.R. §1614.403(a).

\(^1\) This case has been randomly assigned a pseudonym which will replace Complainant’s name when the decision is published to non-parties and the Commission’s website.

\(^2\) As a procedural matter, we note that the Equal Employment Opportunity Commission (EEOC) is both the respondent agency and the adjudicatory authority issuing this decision. For the purposes of this decision, the term “Commission” or “EEOC” is used when referring to the adjudicatory authority and the term “Agency” is used when referring to EEOC in its role as the respondent party. In all cases, the Commission in its adjudicatory capacity operates independently from those offices charged with in-house processing and resolution of discrimination complaints.

\(^3\) A case involving an Agency employee who requests a hearing is held before a contract AJ who is not employed by the Agency. See Logan-King v. Equal Emp't Opportunity Comm'n, EEOC Request No. 05A10082 (Jan. 3, 2002).
For the following reasons, the Commission AFFIRMS the Agency’s final order.

ISSUES PRESENTED

The issues presented are (1) whether the Agency’s appeal is timely; and (2) whether the AJ erred in finding that Complainant had established that the Agency retaliated against him when it issued a Letter of Reprimand.

BACKGROUND

At the time of events giving rise to this complaint, Complainant worked as an Attorney Examiner (Administrative Judge) at the Agency’s Los Angeles District Office (LADO) in Los Angeles, California.

On September 5, 2014, a Paralegal Specialist (PS1) stated to another Paralegal Specialist (PS2) that he felt like he was going to “kill someone.” Initially, PS2 thought that PS1 was just venting and did not report the comment. Approximately one-week later, PS1 entered PS2’s office and stated that he could “take out” anyone in the office, and that he would start with his supervisors, a Supervisory Trial Attorney and the Regional Attorney (RA). PS1 also stated that he needed to do something “drastic” to make the point that he felt that his supervisors did not show him appropriate respect. PS2 became concerned that PS1 would physically harm Agency employees and reported the comments to RA on September 16, 2014.

On September 19, 2014, PS1 sent a mass email to all Agency employees complaining about RA. For example, PS1 stated that he believed that RA engaged in unethical conduct, and that there was “a little girls’ club.” On or about September 23, 2014, the Federal Protective Service found a “box cutter” in PS1’s backpack and escorted him off the premises.

A few days later, Complainant discussed PS1 with a Regional Attorney Secretary (RAS). Complainant stated that his first-line supervisor (S1) later asked if he had “ambushed” RAS. Complainant provided his account of their conversation to S1, who then informed him that she would prefer it if Complainant did not talk to RAS about PS1. Hearing Transcript (HT) at 12-14.

PS1 was removed from the Agency, effective October 16, 2015. PS1 filed an EEO “mixed case” complaint alleging that his removal was motivated by discrimination based on his race, sex, and retaliation for prior EEO activity. PS2 testified as an Agency witness at PS1’s hearing before the Merit Systems Protection Board (MSPB). HT at 514.

On October 21, 2015, Complainant and PS2 had a conversation in the men’s room about PS1’s removal. Later in the day, PS2 went to Complainant’s office to continue their conversation. PS2 stated that, if Complainant informed others of his (PS2’s) participation in PS1’s case, there would be a “problem.” Complainant asked PS2 if he was threatening him, PS2 responded “no,” and he left Complainant’s office. HT 19,32-3.
After their conversation, Complainant went to speak to a coworker (CW) to express concerns that he felt that PS2 threatened him. CW suggested that Complainant allow PS2 time to cool off and come back to apologize. Complainant decided to not report the alleged threat, based on CW’s advice. HT at 529.

After leaving Complainant’s office, PS2 went to look for his supervisors, but they were not in their offices. PS2 found the District Resource Manager (DRM) and reported that Complainant called him a “rat.” PS2 stated that he requested that DRM keep things at the lowest level possible because he was worried about his job because he was “far junior” to Complainant. HT at 494,500. DRM soon reported PS2’s complaint to S1 and RA. Later that day, PS2 spoke with RA and provided the details of his conversations with Complainant. HT at 513.

On or about October 22, 2015, an Agency Attorney (AA) interviewed PS2 about the incident. During their conversation, PS2 informed AA that this was not the first time that Complainant talked to him in a way that he felt was inappropriate, but that PS2 just “let them go.” HT at 508-9. For example, PS2 testified that Complainant remarked that the only reason PS2 had his job was because he was Black and the Agency had a “quota to fill.” PS2 stated that he disagreed with Complainant and noted that his prior experience with the Judge Advocate General’s Corps, and his paralegal and master’s degrees, showed that he was qualified for his position. PS2 testified that Complainant also asked how PS2 could support management, since they “don’t like men” and “run all the men out of the office.” HT at 490-1.

S1 testified that she informed the LADO District Director (DD) about PS2’s complaint, stating that there was an allegation of intimidation by a lower-graded employee against an administrative judge. S1 also informed DD that she had previously counseled Complainant about attempting to intimidate witnesses. HT at 141-2.

On October 28, 2015, S1 requested to meet with Complainant the next day. When Complainant asked S1 about the topic of the meeting, she did not respond. Complainant then emailed S1 informing her that he would send her a memo regarding PS2 “threatening” him. HT at 625,628-9.

On October 29, 2015, S1 met with Complainant and issued him the Letter of Reprimand. S1 noted that, on October 21, 2015, Complainant confronted PS2 and stated that he was a “rat” and disloyal to PS1. S1 expressed concern that this was not the first incident of this kind and noted that she counseled Complainant in 2014 for a similar incident with RAS, in which Complainant confronted RAS about her actions when PS1 was placed on leave for threatening to kill his supervisors. S1 stated that Complainant’s conduct was unprofessional and inappropriate, and as a GS-14 Attorney Examiner with over twenty years of service, his behavior was “particularly egregious” given the imbalance of power between himself and PS2, a GS-11 employee who had only been employed at the Agency for less than two years. S1 also noted that, as an administrative judge, he should be aware of “how inappropriate it is to interfere with or intimidate witnesses in a judicial proceeding.” S1 noted that the Letter of Reprimand was intended to improve Complainant’s conduct and cautioned him against future similar misconduct.
During the same meeting, Complainant gave S1 his written statement alleging that PS2 threatened him on October 21, 2015. Complainant wrote that, when he asked PS2 if he was threatening him, PS2 responded “No, but we are going to have a problem” if Complainant discussed PS2’s role in PS1’s termination with others at LADO. Complainant then stated to PS2, “That sounds like a threat to me.” Complainant noted that PS2 responded that he was not threatening him. Complainant wrote that he was scared because PS2 was a former Navy SEAL and a “trained killer” who had “post traumatic flashbacks.”

In response to Complainant’s allegation, DD assigned the Las Vegas Local Director (LVLD) to conduct an investigation. HT at 185. On January 13, 2016, LVLD issued a memo on his investigation of and findings in Complainant’s allegation that PS2 threatened him on October 21, 2015. LVLD interviewed eight individuals and concluded that there was insufficient evidence: (1) to suggest that PS2 verbally and/or physically threatened Complainant; (2) to reasonably believe that Complainant continues to feel threatened by PS2; or (3) to reasonably believe that there had been any further communication between the two parties since October 21, 2015.

On February 3, 2016, Complainant filed a formal EEO complaint alleging that the Agency discriminated against him on the bases of race (Caucasian), sex (male), and reprisal for prior protected EEO activity when:

1. on October 29, 2015, Complainant was issued the Letter of Reprimand, after no attempt was made to take any statement from Complainant before issuing the Letter of Reprimand, and no attempt was made to ascertain whether the discussions between Complainant and PS2 that were charged in the Letter of Reprimand as involving unspecified threats and intimidation amounted to more than two coworkers and friends engaging in protected opposition to perceived unlawful discrimination/reprisal by LADO RA toward their mutual friend and coworker PS1; and

2. Complainant’s allegation of a “direct threat” by PS2 in Complainant’s office behind closed doors was not immediately investigated and appropriate corrective action taken, similar to the corrective action taken against any other LADO employee when an allegation of a threat is made.

At the conclusion of the EEO investigation, the Agency provided Complainant with a copy of the report of investigation and notice of his right to request a hearing before an AJ. Complainant timely requested a hearing which was held before a contract AJ on April 10-12, 2018.

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4 PS2 testified that he was not a Navy SEAL but was a Tech Operator for a Navy SEAL team. PS2 also denied telling Complainant that he had post-traumatic stress disorder. HT at 478-9.

5 DD initially assigned two local directors to investigate; however, one was unable to take the assignment due to a family situation. HT at 185-7.
On July 13, 2018, both parties submitted their written closing arguments. In Complainant’s submission, he withdrew his sex discrimination claim and his request for compensatory damages.

The AJ issued a decision on September 10, 2018. The AJ determined that Complainant had established a prima facie case of discrimination based on reprisal because management officials were aware of Complainant’s ongoing support for PS1 at the time they issued the Letter of Reprimand. The AJ also found Complainant’s testimony credible that he did not call PS2 a “rat,” and that the October 21, 2015, conversation was that of “two coworkers continuing a routine of discussing [PS1’s] EEO proceedings.” The AJ noted that the causal connection was shown from the timing and the subject of the Letter of Reprimand, and Complainant’s protected activity as a witness and opposition activity by stating his support for PS1’s EEO complaint.

The AJ then determined that the record did not support (1) a legitimate reason for issuing the Letter of Reprimand, without giving Complainant an opportunity to respond to the allegation; (2) a legitimate reason for not interviewing Complainant about the October 21, 2015, conversation, based on the counseling for Complainant’s conversation with RAS the prior year; or (3) that PS2 was intimidated by Complainant during the October 21, 2015, conversation, in light of his approaching Complainant to continue the conversation, and in light of the ongoing conversations and relationship between the two. The AJ also found that the record did not support that Complainant engaged in “disruptive behavior…bullying or witness intimidation.”

The AJ found that, had Complainant “been interviewed about the allegation before issuance of the Letter of Reprimand, the finding undoubtedly would have mirrored [LVLD’s] finding in [Complainant’s] complaint of a threat by [PS2] and would have concluded that the evidence was insufficient to support [PS2’s] complaint about what happened between the two participants.” The AJ concluded that these were pretextual reasons for the Agency’s adverse actions taken in reprisal against Complainant for his protected activity as a witness and opposition activity by stating his support for PS1’s EEO complaint. Accordingly, the AJ found in favor of Complainant on his reprisal claim when he was issued the Letter of Reprimand.

However, the AJ found that Complainant had not met his burden to establish his claim that he was discriminated against based on race when he was issued the Letter of Reprimand. The AJ also found that Complainant had not met his burden to establish that he was discriminated against based on his race or reprisal for claim 2. The AJ determined that the record supports that, while Complainant’s complaint was not processed as quickly as PS2’s complaint, the decision to assign investigators who worked outside of the LADO was reasonable, and the time it took to conduct the investigation was also reasonable.

The Agency subsequently issued a final order rejecting the AJ’s finding that Complainant proved that the Agency subjected him to discrimination as alleged, and simultaneously filed an appeal on the AJ’s decision finding discrimination.
CONTENIONS ON APPEAL

Agency’s Contentions

On appeal, the Agency argues that substantial evidence in the record does not support the AJ’s finding of retaliation when S1 issued the Letter of Reprimand. The Agency states that S1 articulated a legitimate, nondiscriminatory reason because she believed that Complainant had aggressively and inappropriately confronted PS2 about his role as a witness in PS1’s litigation against the Agency. S1 testified that, based on her previous counseling of Complainant for nearly identical conduct, in addition to the credibility of the allegation against Complainant, she believed that he engaged in disruptive conduct, as described by PS2.

The Agency asserts that the AJ’s findings of fact are flawed because she focused on her judgment as to what course of action the Agency should have taken in light of PS2’s allegation against Complainant, rather than the Agency’s motivation for issuing the Letter of Reprimand. The Agency further argues that the AJ speculated in her decision that, had Complainant been interviewed prior to the issuance of the Letter of Reprimand, “the finding would have mirrored LVLD’s finding…and concluded that the evidence was insufficient to support [PS2’s] complaint about what happened between the two participants.” The Agency argues that the factual findings are not supported by substantial evidence, and they constitute an improper substitution of the AJ’s own business judgment for the Agency’s judgment in its manner of response to PS2’s allegation.

The Agency asserts that it was only required to articulate a nondiscriminatory reason for issuing the Letter of Reprimand, which it did, and that the AJ’s disapproval of S1’s decision cannot substitute for an evidentiary finding of pretext. Here, S1 was informed of PS2’s complaint against Complainant, which was the second time an employee raised objections about being aggressively confronted by Complainant about PS1’s legal actions against the Agency.

The Agency also states that the AJ’s belief that Complainant did not call PS2 a “rat” is irrelevant because the Commission previously determined that the issue is not whether a term was used, but whether a management official reasonably believed the allegation. The Agency asserts that the AJ improperly substituted her own judgment without concluding that S1 was not credible, or that her acceptance of PS2’s allegation was so unreasonable that one could only conclude that she was masking discriminatory animus based on reprisal. As such, the Agency argues that the finding should be reversed, and requests that the Commission enter judgment in its favor on all accepted claims.

Complainant’s Contentions

Complainant filed an opposition brief on December 13, 2018. As an initial matter, Complainant states that he is not appealing the AJ’s finding on claim 2. Complainant challenges the timeliness of the Agency’s final order and appeal. Complainant asserts that the deadline for the Agency to issue a final order and file an appeal would be no later than October 25, 2018.
Complainant argues that the AJ’s factual findings are entitled to deference, and that the Agency failed to identify substantial evidence to overturn her findings. Specifically, Complainant states that the Agency was unable to produce testimony showing that he called PS2 a “rat.” Complainant also argues that RA was clearly concerned about his support for PS1, and that the AJ found his communications with PS2 and RAS were protected as opposition to discrimination. Complainant notes that AA corroborated that management officials were aware of his prior participation in PS1’s EEO and MSPB proceedings.

Regarding the Agency’s argument that the AJ substituted her judgement for that of the decision maker, Complainant argues that the AJ found Complainant to be credible and attached more weight to his testimony than to that of other witnesses.

Complainant further argues that language in the Letter of Reprimand is direct evidence of per se retaliation and meant to chill Complainant from engaging any of his co-workers with discussions of his opposition to discrimination. Complainant states that the AJ’s legal analysis and conclusions were proper and requests that the Commission sustain her finding that the Agency retaliated against him when it issued him the Letter of Reprimand.

The Agency filed an additional brief on January 31, 2019, to which Complainant replied on March 19, 2019. The Agency asserts that it did not receive the hearing file until October 8, 2018, which renders its appeal timely.

ANALYSIS AND FINDINGS

Standard of Review

Pursuant to 29 C.F.R. § 1614.405(a), all post-hearing factual findings by an AJ will be upheld if supported by substantial evidence in the record. Substantial evidence is defined as “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Universal Camera Corp. v. National Labor Relations Board, 340 U.S. 474, 477 (1951) (citation omitted). A finding regarding whether or not discriminatory intent existed is a factual finding. See Pullman-Standard Co. v. Swint, 456 U.S. 273, 293 (1982). An AJ’s conclusions of law are subject to a de novo standard of review, whether or not a hearing was held. An AJ’s credibility determination based on the demeanor of a witness or on the tone of voice of a witness will be accepted unless documents or other objective evidence so contradicts the testimony, or the testimony so lacks in credibility that a reasonable fact finder would not credit it. See EEOC Management Directive for 29 C.F.R. Part 1614 (MD-110), Chap. 9, at § VI.B. (Aug. 5, 2015).

In this case, the AJ did not render overall credibility determinations regarding the witnesses but noted when she found certain testimony credible. Specifically, the AJ found Complainant to be credible when he testified that he did not call PS2 a “rat,” and that their conversations were a continuation of their routine discussion of PS1’s EEO case. In addition, the AJ found credible DRM’s testimony that it was generally known that Complainant supported PS1 in his EEO proceedings.
We note that while the Agency argued that the AJ’s belief that Complainant did not call PS2 a rat was irrelevant, and that her reliance on her belief was improper, it did not challenge the AJ’s credibility determinations. Nor did complainant challenge the AJ’s credibility determinations; as such, we accept the AJ’s credibility determinations. 6

**Timeliness of Final Order and Appeal**

Commission regulations state that an agency is to issue a final order within forty (40) days of receipt of the hearing file and the administrative judge’s decision. If the final order does not fully implement the decision of the administrative judge, then the agency shall simultaneously file an appeal in accordance with § 1614.403. See 29 C.F.R. §1614.110. Additionally, at the conclusion of the hearing stage, the administrative judge shall send to the parties (the agency representative, the agency EEO Director or EEO Office, the complainant, and the complainant’s representative) copies of the record produced at the hearing stage of the process, including the transcript of the hearing, if any, as well as the decision. The administrative judge may, when necessary, release the transcript prior to the issuance of the decision, for example, when the transcript is needed to prepare a post-hearing brief or to prepare for a hearing on relief. See 29 C.F.R. §1614.109(i); MD-110 at Chap. 7 § III(F).

It is the Commission’s policy to require each agency to designate one office for receipt of decisions, and the date of receipt by the designated office is the operative date in determining the timeliness of an agency's action. See Charles v. Dep't of the Navy, EEOC Request No. 05890974 (Nov. 17, 1989). Further, the Commission has found that timeliness of an appeal is based on the date of receipt by the Agency’s designated contact. See Newkirk v. Office of Personnel Mgt., EEOC Appeal No. 0720090022 (May 20, 2010); Miller v. U.S. Postal Serv., EEOC Request No. 05A40871 (June 29, 2006); Robinson v. Dep't of the Army, EEOC Request No. 05930965 (Sept. 22, 2004). In this case, the Agency’s designated office for receipt of the Commission’s decision is its Office of Equal Opportunity (OEO). While we note that the Agency’s counsel received a copy of the hearing transcript and exhibits on May 7, 2018, the record shows that OEO did not receive the complete hearing file until October 8, 2018, which makes its appeal deadline November 17, 2018. Complainant offered no contradicting evidence or argument. The Agency issued the final order and simultaneously filed the instant appeal on November 14, 2018. Accordingly, we find that the Agency’s appeal is timely.

**Protected Activity: Opposition**

Complainant can establish a prima facie case of reprisal discrimination by presenting facts that, if unexplained, reasonably give rise to an inference of discrimination. Shapiro v. Social Security Admin., EEOC Request No. 05960403 (Dec. 6, 1996) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)). For a reprisal claim, a complainant may establish a prima facie case by showing that: (1) he or she engaged in a protected activity; (2) the agency was aware of the protected activity; (3) subsequently, he or she was subjected to adverse treatment by the agency;

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6 On appeal, Complainant asserts that the AJ found management officials to be not credible. However, the AJ did not determine that any witness was not credible.
and (4) a nexus exists between the protected activity and the adverse treatment. Whitmire v. Dep't of the Air Force, EEOC Appeal No. 01A00340 (Sept. 25, 2000).

The anti-retaliation provisions made it unlawful to discriminate against an individual because he or she has opposed any practice made unlawful under the employment discrimination statutes. EEOC Enforcement Guidance on Retaliation and Related Issues (Enforcement Guidance on Retaliation), No. 915.004 at II.A. (Aug. 25, 2016). Examples of opposition include threatening to file a formal complaint alleging discrimination, complaining to anyone about alleged discrimination against oneself or others, refusing to obey an order because of a reasonable belief that it is discriminatory, and requesting reasonable accommodation or religious accommodation. Id.

Although the opposition clause in each of the EEO statutes is broad, the manner in which an individual protests perceived employment discrimination must be reasonable in order for the anti-retaliation provisions to apply. In applying a “reasonableness” standard, courts and the Commission balance the right of individuals to oppose employment discrimination and the public's interest in enforcement of the EEO laws against an employer's need for a stable and productive work environment. Id. Public criticism of alleged discrimination may be a reasonable form of opposition; courts have protected an employee's right to inform an employee's customers about the employer's alleged discrimination, as well as the right to engage in peaceful picketing to oppose allegedly discriminatory employment practices. On the other hand, courts have found that certain activities, such as badgering a subordinate employee to give a witness statement in support of an EEOC charge and attempts to coerce her to change that statement were not reasonable, and thus not protected. Id.

The Commission has found that protected activity consisting of opposition to discrimination must be reasonable in manner. Whether an employee’s opposition is reasonable is a context and fact-specific inquiry, in which the right to oppose employment discrimination must be balanced against the employer's need to maintain a stable and productive work environment. See Gia M. v. Dep’t of Defense, EEOC Petition No. 0320130002 (Aug. 12, 2016) (complainant’s accessing and printing confidential documents related to alleged discrimination to show to a coworker was not considered protected EEO activity because it was not reasonable), citing Enforcement Guidance on Retaliation, No. 915.004 at II.A.; see also Matima v. Celli, 228 F.3d 68, 79 (2d Cir. 2000) (explaining that most circuit courts agree that “disruptive or unreasonable protests against discrimination are not protected activity under Title VII and therefore cannot support a retaliation claim.”).

In this case, we find that the AJ erred when she found that Complainant’s conversations with RAS and PS2 constituted protected activity. While Complainant argued that he engaged in protected activity because he was opposing discrimination against PS1 by Agency officials during these discussions, we find that the record shows that his actions were not reasonable because he engaged in intimidation of other employees.
S1 testified that RAS reported to her that she felt “ambushed,” “harassed,” “intimidated” and “threatened” by Complainant.\(^7\) HT at 562. PS2 testified that he felt that Complainant was trying to make him feel guilty about participating in PS1’s EEO complaint, and that Complainant was retaliating against him for speaking up. HT at 512. PS2 further testified that he felt that Complainant was trying to dissuade him from providing testimony in PS1’s hearing.\(^8\) HT at 514. Therefore, we find that the AJ erred when she held that Complainant’s conversations with RAS and PS2, which they reported as intimidating, were reasonable protected activity. However, we accept the AJ’s factual finding that S1 was aware of Complainant’s prior EEO activity.

**Letter of Reprimand**

Upon review, we find that substantial evidence in the record does not support the AJ’s finding that the Agency retaliated against Complainant when it issued him the Letter of Reprimand. For the purposes of this decision, we will assume that Complainant established a prima facie case of discrimination based on reprisal stemming from Complainant’s support of PS1’s EEO matter.

The AJ concluded that the Agency did not articulate a legitimate, nondiscriminatory reason for issuing the Letter of Reprimand. However, the AJ erred in this conclusion because the record shows that S1 provided a legitimate, nondiscriminatory reason; namely, a second individual complained about “harassing or intimidating” interactions with Complainant. HT at 666. S1 testified that, because this was the second incident, she thought that discipline in writing was needed. HT at 613.

The AJ may have believed that Complainant did not actually call PS2 a “rat,” and that he did not bully or intimidate witnesses. However, the issue is not whether Complainant actually engaged in that conduct, but whether S1 reasonably believed the allegations made against Complainant at the time she issued the Letter of Reprimand. See Anderson v. U.S. Postal Serv., EEOC Appeal No. 0720090016 (Dec. 1, 2009) (AJ found that the management officials’ actions were reasonable because they reasonably believed that the complainant engaged in conduct warranting discipline).

The record shows that PS2 repeatedly informed DRM, RA, and AA that Complainant called him a “rat.” HT at 494,499-500,503,510. Additionally, DRM, RA, and AA provided consistent testimony that PS2 informed them that Complainant called him a “rat.” HT at 254,302,366. S1 testified that she trusted DRM, RA, and AA’s understanding of the events, and with the prior incident with RAS, PS2’s allegation seemed credible. HT at 600. Further, DD, who recommended that S1 issue the Letter of Reprimand, testified that “it’s not a question of whether or not the word ‘rat’ was used or not…the totality with respect to the concept…was intimidation.” HT at 166. As such, we find that the AJ erred when she found that the Agency did not provide a legitimate, nondiscriminatory reason for issuing the Letter of Reprimand.

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\(^7\) RAS did not testify at this hearing.

\(^8\) S1 noted that PS1 still had ongoing litigation against the Agency. HT at 671-2.
We also find that Complainant did not prove by a preponderance of the evidence that the Agency’s reasons were pretextual. Pretext can be demonstrated by showing such weaknesses, inconsistencies, or contradictions in the Agency's proffered legitimate reasons for its action that a reasonable fact finder could rationally find them unworthy of credence. See Opare-Addo v. U.S. Postal Serv., EEOC Appeal No. 0120060802 (Nov. 20, 2007) (finding that the agency’s explanations were confusing, contradictory, and lacking credibility, which were then successfully rebutted by the complainant), request for recon. denied, EEOC Request No. 0520080211 (May 30, 2008).

In her decision, the AJ stated that pretext was shown because, had Complainant “been interviewed about the allegation before issuance of the Letter of Reprimand, the finding undoubtedly would have mirrored [LVLD’s] finding in [Complainant’s] complaint of a threat by [PS2] and would have concluded that the evidence was insufficient to support [PS2’s] complaint about what happened between the two participants.” However, we do not find that there is substantial evidence in the record to support this assertion. We note that LVLD’s investigation was focused on Complainant’s allegation that PS2 threatened him, and there is no discussion in his memo about PS2’s complaint against Complainant. As such, we find that this is not substantial evidence proving that, had the management officials interviewed Complainant prior to his formal reprimand, they would have concluded that PS2’s allegations against Complainant were not substantiated.

Further, even if the AJ’s assertion were correct and the results of the investigation would have been identical, this does not affect our analysis. The correct question is whether S1 reasonably believed PS2’s allegation, given that this was Complainant’s second offense of its kind. The way that the investigation was conducted, and any possible outcome are not relevant to the question of S1’s belief regarding Complainant’s alleged actions. Here, S1’s testimony and other evidence in the record supports her belief that this was Complainant’s second witness intimidation offense.

Additionally, we find that the AJ erred when she substituted her judgment in determining that S1 would not have believed PS2’s allegation if she had spoken with Complainant prior to the issuance of the Letter of Reprimand. An employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but it does not have to be a reason that the trier of fact would act on or approve. See Wrenn v. Gould, 808 F.2d 493 (6th Cir. 1987). An employer is entitled to make her own business judgements. The reasonableness of the employer's decision may, of course, be probative of whether it is pretext.

The trier of fact must understand that the focus is on the employer's motivation, not its business judgement. See Loeb v. Textron, Inc., 600 F.2d 1003, 1012 n. 6 (1st Cir. 1979); see also generally Anderson v. U.S. Postal Serv., EEOC Appeal No. 0720090016 (Dec. 1, 2009) (noting that the pivotal inquiry was whether management reasonably believed the complainant had engaged in conduct warranting discipline and finding that evidence did not show that the agency's action in disciplining complainant was so unreasonable as to establish pretext); Glass v. U.S. Postal Serv., EEOC Appeal No. 07A50068 (Jun. 15, 2006) (focus was on agency's motivation and not its business judgment; finding that AJ erred in substituting his business judgment - regarding weight that agency should give to coworker complaints -- for that of agency with respect to agency's
termination of complainant); Thomas v. Dep’t of Transp., EEOC Appeal No. 01945798 (Dec. 12, 1996) (finding that the AJ erroneously substituted her business judgment for that of the agency with regard to analyzing the agency’s personnel decision).

Under a cat's paw theory of liability, animus and responsibility for adverse action can be attributed to a supervisor who was not the ultimate decision maker, if that supervisor intended the adverse action to be a consequence of her discriminatory conduct. See Feder v. Dep't of Justice, EEOC Appeal No. 0720110014 (July 19, 2012) (appropriate under cat's paw theory, to impute manager's retaliatory animus to deciding official where manager wielded sufficient informal power influence deciding official and deciding official acted as a conduit for manager's retaliatory animus related to complainant's reasonable accommodation). Complainant alleges that RA was responsible for the discipline. However, the record does not support his assertion. RA testified that while she was involved in the discussions, she “had no involvement in the decisions.” HT at 325. S1 testified that she was the ultimate decision maker, and that the Office of General Counsel and DD recommended the issuance of the Letter of Reprimand. DD corroborated that she recommended that S1 issue the Letter of Reprimand. HT at 593,612,154. We find that there is no evidence to support Complainant’s contention that RA intended the Letter of Reprimand to be issued in retaliation for Complainant’s support of PS1’s case.

We note, however, that some of the Agency’s actions raise concerns. For example, Agency attorneys that defended the Agency in PS1’s EEO matters were involved in the decision-making process and the drafting of the Letter of Reprimand. However, the Commission has found that when an agency attorney was acting within his capacity as an agency's labor advisor, a complainant who challenges the attorney’s action as retaliatory must show that the agency attorney was unlawfully motivated in his actions by a complainant’s protected category. See Nerissa S. v. Dep’t of the Army, EEOC Appeal No. 0120172858 (Dec. 12, 2018); request for recon. denied, EEOC Request No. 2019002931 (July 30, 2019). Here, there is no evidence that Agency attorneys were unlawfully motivated to retaliate against Complainant.

In addition, while S1 might have handled the situation better by speaking with Complainant before issuing the Letter of Reprimand and by narrowing the language in the Letter of Reprimand, we find that S1’s decisions were not so unreasonable as to establish pretext. As noted above, RAS’s prior similar complaint against Complainant was a factor in the determination that PS2’s allegation was credible. While the AJ disagreed with the Agency’s decision not to interview Complainant prior to issuing the Letter of Reprimand, the AJ did not find that testimonies of the management officials were not credible. We also find that there was no inconsistent or contradictory testimony in the record that would show pretext for discrimination. Accordingly, we hold that the AJ erred when she found that the Agency did not articulate a legitimate, nondiscriminatory reason for issuing the Letter of Reprimand, and when she determined that Complainant had proven pretext for discrimination.
Per Se Reprisal

The Commission has held that attempting to dissuade an employee from participating in the EEO process is a *per se* violation of the EEOC’s regulations against interference in the EEO process. See *Lewis v. U.S. Postal Serv.*, EEOC Appeal No. 01922440 (Apr. 14, 1994) (attempts by management to dissuade an employee from filing a sexual harassment complaint are “unequivocally prohibited by the regulations…”); see also *Mindy O. v. Dep’t of Homeland Security*, EEOC Appeal No. 0720150010 (Sept. 2, 2016).

In the Letter of Reprimand to Complainant, the Agency states:

> Finally, I am disturbed by the fact that you have continually tried to interfere in matters involving [PS1]. [PS1’s] suspension and subsequent removal from the Commission have nothing to do with you and are not your concern. [S1] will not tolerate your attempts to interfere in this matter in any form; particularly by intimidating witnesses.

While we disagree with the Agency’s statement that PS1’s suspension and removal were not Complainant’s concern insofar as Complainant believed that PS1 was a victim of the Agency’s discriminatory actions, we do believe that the Agency was correct in taking action when it believed that Complainant was attempting to intimidate lower-graded employees who were witnesses at PS1’s hearing. Unlike in *Lewis* and *Mindy O.*, where the Commission found evidence of *per se* reprisal, here there was no attempt to block or discourage Complainant’s usage of the EEO process—rather Complainant’s supervisor was addressing Complainant’s attempt to chill other employees’ participation in the EEO process at the Agency. As such, we find that Complainant has not established that the Agency’s conduct was *per se* reprisal.

**CONCLUSION**

We find that the Agency’s appeal was timely filed and that the AJ erred in holding that Complainant established that the Agency retaliated against him when it issued him the Letter of Reprimand. Therefore, based on a thorough review of the record and the contentions on appeal, including those not specifically addressed herein, we AFFIRM the Agency’s final order rejecting the AJ’s decision finding of retaliation; but accepting the AJ’s decision that the Agency did not discriminate against Complainant based on his race when it issued him the Letter of Reprimand, or based on his race or in reprisal for protected EEO activity when it did not immediately investigate and take corrective action on Complainant’s complaint.
STATEMENT OF RIGHTS - ON APPEAL
RECONSIDERATION (M0617)

The Commission may, in its discretion, reconsider the decision in this case if the Complainant or the Agency submits a written request containing arguments or evidence which tend to establish that:

1. The appellate decision involved a clearly erroneous interpretation of material fact or law; or
2. The appellate decision will have a substantial impact on the policies, practices, or operations of the Agency.

Requests to reconsider, with supporting statement or brief, must be filed with the Office of Federal Operations (OFO) within thirty (30) calendar days of receipt of this decision. A party shall have twenty (20) calendar days of receipt of another party’s timely request for reconsideration in which to submit a brief or statement in opposition. See 29 C.F.R. § 1614.405; Equal Employment Opportunity Management Directive for 29 C.F.R. Part 1614 (EEO MD-110), at Chap. 9 § VII.B (Aug. 5, 2015). All requests and arguments must be submitted to the Director, Office of Federal Operations, Equal Employment Opportunity Commission. Complainant’s request may be submitted via regular mail to P.O. Box 77960, Washington, DC 20013, or by certified mail to 131 M Street, NE, Washington, DC 20507. In the absence of a legible postmark, the request to reconsider shall be deemed timely filed if it is received by mail within five days of the expiration of the applicable filing period. See 29 C.F.R. § 1614.604. The agency’s request must be submitted in digital format via the EEOC’s Federal Sector EEO Portal (FedSEP). See 29 C.F.R. § 1614.403(g). The request or opposition must also include proof of service on the other party.

Failure to file within the time period will result in dismissal of your request for reconsideration as untimely, unless extenuating circumstances prevented the timely filing of the request. Any supporting documentation must be submitted with your request for reconsideration. The Commission will consider requests for reconsideration filed after the deadline only in very limited circumstances. See 29 C.F.R. § 1614.604(c).

COMPLAINANT’S RIGHT TO FILE A CIVIL ACTION (S0610)

You have the right to file a civil action in an appropriate United States District Court within ninety (90) calendar days from the date that you receive this decision. If you file a civil action, you must name as the defendant in the complaint the person who is the official Agency head or department head, identifying that person by his or her full name and official title. Failure to do so may result in the dismissal of your case in court. “Agency” or “department” means the national organization, and not the local office, facility or department in which you work. If you file a request to reconsider and also file a civil action, filing a civil action will terminate the administrative processing of your complaint.
RIGHT TO REQUEST COUNSEL (Z0815)

If you want to file a civil action but cannot pay the fees, costs, or security to do so, you may request permission from the court to proceed with the civil action without paying these fees or costs. Similarly, if you cannot afford an attorney to represent you in the civil action, you may request the court to appoint an attorney for you. **You must submit the requests for waiver of court costs or appointment of an attorney directly to the court, not the Commission.** The court has the sole discretion to grant or deny these types of requests. Such requests do not alter the time limits for filing a civil action (please read the paragraph titled Complainant’s Right to File a Civil Action for the specific time limits).

FOR THE COMMISSION:

/S/ Bernadette B. Wilson  
Bernadette B. Wilson  
Executive Officer  
Executive Secretariat

August 18, 2020  
Date